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I. DEFINITIONS

A. Generally

"The standard of review focuses on the deference an appellate court affords to the decisions of a District Court, jury or agency." Paul G. Ulrich, P.C. & Sidley Austin, LLP, 1 Fed. Appellate Prac. Guide 9th Cir. 2d § 4:1 (2011). The proper standard of review is a question of federal procedure and is therefore governed by federal law. *See Freund v. Nycomed Amersham*, 347 F.3d 752, 762 (9th Cir. 2003).

"[D]ecisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion)." *See Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000) (quotation marks and citation omitted). The selection of the appropriate standard of review is contextual. *See United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000). For example, the de novo standard applies when issues of law predominate in the district court's decision. *Id.* When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate. *See id.*; *see also Holly D. v. California Inst. of Tech.*, 339 F.3d 1158, 1180 n.27 (9th Cir. 2003) (noting court would apply different standards of review depending on the district court's intention); *Navellier v. Sletten*, 262 F.3d 923, 944 (9th Cir. 2001) (noting the "standard of review on appeal . . . depends on the nature of the claimed error.").

The standard of review may be critical to the outcome of the case. *See Dickinson v. Zurko*, 527 U.S. 150, 152-61 (1999) ("The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used."); *see also Southwest Voter Registration Educ. Pro. v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc) (per curiam) (noting "standard of review is important to our resolution of this case"); *Krull v. SEC*, 248 F.3d 907, 914 (9th Cir. 2001) (noting deferential standard of review "constrains us, even if we might decide otherwise were it left to our independent judgment"); *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992) ("The relevant standards of review are critical to the outcome of this case."); *Walsh v. Centeio*, 692 F.2d 1239, 1241 (9th Cir. 1982) ("[T]he outcome of the instant case turns on the standard of review . . . .").

In some cases, the court has elected not to decide which standard of review is applicable on the ground that the outcome would not be changed by applying different standards of review. *See, e.g.*, *E.T. v. Cantil-Sakauye*, No. 10-15248, --- F.3d ---, 2012 WL 763541 at *2 n.3 (9th Cir. March 12, 2012) (per curiam); *United States v. Laurienti*, 611 F.3d 530, 551 (9th Cir. 2010); *United States v. Rivera*, 527 F.3d 891,908 (9th Cir. 2008); *United States v. Pimentel-Flores*, 339 F.3d 959, 967 n.10 (9th Cir. 2003).

For further reading on standards of review generally, *see* Steven Alan Childress & Martha S. Davis, 1-1 Fed. Standards of Review § 1.01 (2011); Steven Alan Childress, Standards of Review Primer: Federal Civil Appeals, 229 F.R.D. 267 (2005).

B. De Novo

De novo review means that this court views the case from the same position as the district court. *See Lawrence v. Dep't of Interior*, 525 F.3d 916, 920 (9th Cir. 2008); *see also Lewis v. United States*, 641 F.3d 1174, 1176 (9th Cir. 2011). The appellate court must consider the matter anew, as if no decision previously had been rendered. *See Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006). Review is "independent," *see Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002), or "plenary," *see Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1193 (9th Cir. 2007); *United States v. Waites*, 198 F.3d 1123, 1126 (9th Cir. 2000). No deference is given to the district court. *See Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011); *Ditto v. McCurdy*, 510 F.3d 1070, 1075 (9th Cir. 2007); *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 971 (9th Cir. 2003) ("When de novo review is compelled, no form of appellate deference is acceptable.").

1. Questions of Law Reviewed De Novo

- Mootness, ripeness, standing. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011); *Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010); *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003).
- Statutory interpretation. *See Schleining v. Thomas*, 642 F.3d 1242, 1246 (9th Cir. 2011); *Beeman v. TDI Managed Care Svcs.*, 449 F.3d 1035, 1038 (9th Cir. 2006); *see also Vega v. Holder*, 611 F.3d 1168, 1170 (9th Cir. 2010) (reviewing de novo BIA's interpretation of statute, but explaining that "[i]f,

however, Congress has not directly addressed the exact issue in question, a reviewing court must defer to the agency's construction of the statute so long as it is reasonable." (quotation marks and citation omitted)).

- Contract interpretation. *See* *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009); *Milenbach v. Commissioner*, 318 F.3d 924, 930 (9th Cir. 2003); *but see* *Tyler v. Cuomo*, 236 F.3d 1124, 1134 (9th Cir. 2000) (stating that the interpretation of a contract is a mixed question of law and fact reviewed de novo).
- Constitutionality of statute. *See* *United States v. Perelman*, 658 F.3d 1134, 1134-35 (9th Cir. 2011); *United States v. Vongxay*, 594 F.3d 1111, 1114 (9th Cir. 2010); *United States v. Bolanos-Hernandez*, 492 F.3d 1140, 1141 (9th Cir. 2007).
- Interpretation of federal rules. *See* *United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011) (evidence); *United States v. Alvarez-Moreno*, 657 F.3d 896, 900 n.2 (9th Cir. 2011) (criminal procedure); *Riordan v. State Farm Mut. Auto. Ins.*, 589 F.3d 999, 1004 (9th Cir. 2009) (civil procedure).
- Judicial estoppel. *See* *Tritchler v. County of Lake*, 358 F.3d 1150, 1154 (9th Cir. 2004).

2. Mixed Questions of Law and Fact

A mixed question of law and fact arises when the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. *See* *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982); *see also* *Khan v. Holder*, 584 F.3d 773, 780 (9th Cir. 2009); *Suzy's Zoo v. Commissioner*, 273 F.3d 875, 878 (9th Cir. 2001) (stating that a mixed question "exists when primary facts are undisputed and ultimate inferences and legal consequences are in dispute"). Mixed questions of law and fact generally require the consideration of legal concepts and the exercise of judgment about the values that animate legal principles. *See* *Smith v. Commissioner*, 300 F.3d 1023, 1028 (9th Cir. 2002). Mixed questions of law and fact are generally reviewed de novo. *See* *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004); *but see* *Haile v. Holder*, 658 F.3d 1122, 1125 (9th Cir. 2011) ("We review … determinations of mixed questions of law and fact for substantial evidence."). Examples include:

- Whether ERISA fiduciary duties breached. *See* *Mathews*, 362 F.3d at 1180.
- Whether marital privilege waived. *See* *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 665 (9th Cir. 2003).
- Whether taxpayer is a "producer." *See* *Suzy's Zoo*, 273 F.3d at 878.
- Whether suspect is in custody. *See* *United States v. Female Juvenile (Wendy G.)*, 255 F.3d 761, 765 (9th Cir. 2001).
- Whether right to counsel waived. *See* *United States v. Hantzis*, 625 F.3d 575, 579 (9th Cir. 2010); *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001); *see also* *Sechrest v. Ignacio*, 549 F.3d 789, 805 (9th Cir. 2008) ("Miranda claims present mixed questions of law and fact.").
- Whether reasonable suspicion exists. *See* *United States v. Jimenez-Medina*, 173 F.3d 752, 754 (9th Cir. 1999).
- Whether district court erred by refusing to compel use immunity. *See* *United States v. Wilkes*, 662 F.3d 524, 532 (9th Cir. 2011); *United States v. Straub*, 538 F.3d 1147, 1156 (9th Cir. 2008).
- Whether exigent circumstances existed. *See* *United States v. Reilly*, 224 F.3d 986, 991 (9th Cir. 2000).
- Whether there was ineffective assistance of counsel in habeas corpus proceedings. *See* *Rhoades v. Henry*, 638 F.3d 1027, 1034 (9th Cir. 2011).

Note that "[f]actual findings underlying the district court's ruling are reviewed for clear error." *Wilkes*, 662 F.3d at 532 (internal quotation marks and citation omitted). Furthermore, if, the application of the law to the facts requires an inquiry that is "essentially factual," review is for clear error. *See* *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 518-19 (9th Cir. 2011) ("[M]ixed questions of fact and law are reviewed de novo, unless the mixed question is primary factual." (internal quotation marks and citation omitted)); *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002); *see also* *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir. 1995) ("This standard of review is an exception to the general rule that mixed questions of law and fact are reviewed de novo."). For example:

- Whether proximate cause shown. *See* *Harper v. City of Los Angeles*, 533 F.3d 1010, 1027 n.13 (9th Cir. 2008); *Tahoe-Sierra*

Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 783 (9th Cir. 2000).

- Whether established facts constitute negligence. *See Sacks v. Commissioner*, 82 F.3d 918, 920 (9th Cir. 1996).
- Whether individual is "disabled" for purposes of ERISA plan. *See Deegan v. Continental Cas. Co.*, 167 F.3d 502, 506 (9th Cir. 1999).

C. Clearly Erroneous

A district court's findings of fact are reviewed under the clearly erroneous standard. *See* Fed. R. Civ. P. 52(a)(6); *United States v. Cazares*, 121 F.3d 1241, 1245 (9th Cir. 1997) (standard applied in both civil and criminal proceedings). "Findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations, which explains why they are reviewed deferentially under the clearly erroneous standard." *Rand v. Rowland*, 154 F.3d 952, 957 n.4 (9th Cir. 1998) (en banc). Special deference is paid to a trial court's credibility findings. *See Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985); *McClure v. Thompson*, 323 F.3d 1233, 1241 (9th Cir. 2003).

Review under the clearly erroneous standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001); *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1136 (9th Cir. 2011); *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1175 (9th Cir. 2010) (en banc) (per curiam); *see also Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 888 (9th Cir. 2008) (concluding the district court clearly erred). If the district court's account of the evidence is plausible in light of the entire record, the court of appeals may not reverse, even if it would have weighed the evidence differently. *See Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002); *see also United States v. McCarty*, 648 F.3d 820, 824 (9th Cir. 2011); *Katie A., ex. Rel. Ludin v. Los Angeles County*, 481 F.3d 1150, 1155 (9th Cir. 2007). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Elliott*, 322 F.3d 710, 715 (9th Cir. 2003); *see also United States v. Stanley*, 653 F.3d 946, 952 (9th Cir. 2011); *United States v. Al Nasser*, 555 F.3d 722, 727 (9th Cir. 2009).

The court of appeals reviews for clear error where:

- District court adopts proposed findings submitted by parties. *See* *Anderson v. Bessemer City*, 470 U.S. 564, 571-73 (1985); *see also* *Silver v. Executive Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 733 (9th Cir. 2006); *Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1112 (9th Cir. 2000) (noting while review is for clear error, the reviewing court will review with "particularly close scrutiny" when findings are adopted).
- Findings of fact are based on stipulations. *See* *Smith v. Commissioner*, 300 F.3d 1023, 1028 (9th Cir. 2002).
- Findings of fact are based solely on written record. *See R.B., ex.rel.* *F.B. v. Napa Valley Unified School District*, 496 F.3d 932, 937 (9th Cir. 2007); *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 887 (9th Cir. 2001).
- Findings of fact after a bench trial. *See* *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011); *Twentieth Century Fox Film Corp. v. Entertainment Distributing*, 429 F.3d 869, 879 (9th Cir. 2005); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003), *clarified by* 366 F.3d 731 (9th Cir. 2004) (order); *see also* *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 384 (9th Cir. 1994) ("In reviewing a bench trial, this court shall not set aside the district court's findings of fact, whether based on oral or documentary evidence, unless they are clearly erroneous.").

D. Abuse of Discretion

"An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotation marks omitted); *see also* *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 698 n.11 (9th Cir. 2011). Under the abuse of discretion standard, a reviewing court cannot reverse absent a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors. *See* *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 953 (9th Cir. 2011); *Valdivia v.*

Schwarzenegger, 599 F.3d 984, 988 (9th Cir. 2010) (citing *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001)); *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000) (noting reversal under abuse of discretion standard is possible only "when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances"). The abuse of discretion standard requires an appellate court to uphold a district court determination that falls within a broad range of permissible conclusions. *See Kode v. Carlson*, 596 F.3d 608, 612-13 (9th Cir. 2010) (per curiam); *Grant v. City of Long Beach*, 315 F.3d 1081, 1091 (9th Cir. 2002), *amended by* 334 F.3d 795 (9th Cir. 2003) (order).

A district court abuses its discretion when:

- District court does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. *See Jeff D. v. Otter*, 643 f.3d 278 (9th Cir. 2011) (citing *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004)).
- District court rules in an irrational manner. *See Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003); *see also Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1084 (9th Cir. 2010) (concluding district court did not rule in an irrational manner).
- District court makes an error of law. *See Koon v. United States*, 518 U.S. 81, 100 (1996); *Strauss v. Comm'r of the Soc. Sec. Admin.*, 635 F.3d 1135, 1137 (9th Cir. 2011) (citing *Koon*); *Forest Grove School Dist. v. T.A.*, 523 F.3d 1078, 1085 (9th Cir. 2008) (applying *Koon*); *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) (applying *Koon*). Thus, the court abuses its discretion by erroneously interpreting a law, *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1289 (9th Cir. 1994), or by resting its decision on an inaccurate view of the law, *Richard S. v. Dep't of Dev. Servs.*, 317 F.3d 1080, 1085-86 (9th Cir. 2003). *See also Fox v. Vice*, 131 S. Ct. 2205, 2211 (2011) (recognizing trial court has wide discretion "but only when, it calls the game by the right rules").
- Record contains no evidence to support district court's decision. *See Oregon Natural Res. Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995).

E. Arbitrary and Capricious

Review of agency determinations is limited to whether the agency's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, or if it was taken without observance of procedure required by law. 5 U.S.C. § 706(2)(A); *see also* *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011) ("Review under the arbitrary and capricious standard is narrow, and we do not substitute our judgment for that of the agency."); *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1224 (9th Cir. 2011); *City of Los Angeles v. U.S. Dep't of Commerce*, 307 F.3d 859, 874 (9th Cir. 2002). "An agency decision will be upheld as long as there is a rational connection between the facts found and the conclusions made." *Barnes*, 655 F.3d at 1132 (citing *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 554 (9th Cir. 2009)).

Under the arbitrary and capricious standard, a reviewing court must consider whether an agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003). The court may reverse only when the agency has relied on impermissible factors, failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence or is so implausible it could not be ascribed to a difference in view or to agency expertise. *See id.*; *County of Los Angeles v. Leavitt*, 521 F.3d 1073, 1078 (9th Cir. 2008). The standard is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *See Ranchers Cattleman Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agriculture*, 499 F.3d 1108, 1115 (9th Cir. 2007) (internal quotations and citation omitted); *see also* *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010); *Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Service*, 475 F.3d 1136, 1140 (9th Cir. 2007); *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001) (court must determine whether the agency articulated a rational connection between the facts found and the choice made); *Price Rd. Neighborhood Ass'n v. U.S. Dep't of Transp.*, 113 F.3d 1505, 1511 (9th Cir. 1997) (court must consider whether the agency's decision is based on a reasoned evaluation of the relevant factors).

1. Deference to Agency Interpretation of Statute or Regulation

Generally, an agency's interpretation of a statutory provision or regulation it is charged with administering is entitled to deference. *See* *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1175 (9th Cir. 2002).[1] However, this deference is not absolute. *See* *Nat'l Wildlife Federation v. Nat'l Marine Fisheries Service*, 524 F.3d 917, 931 (9th Cir. 2008) (explaining two-prong analysis used to determine whether agency's construction of its own regulation is entitled to deference).

2. Instances Where No Deference Warranted

- Agency rests decision on misinterpretation of Supreme Court precedent. *See* *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 633 (9th Cir. 2007); *Lucas v. NLRB*, 333 F.3d 927, 931 (9th Cir. 2003).
- Agency had no authority to act. *See* *Northern Plains Res. Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1155, 1164 n.4 (9th Cir. 2003).
- "Congress has directly spoken to the precise question at issue." *Cmty. Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 789 (9th Cir. 2003) (internal quotation marks and citation omitted).
- Agency is merely advancing litigation position, not an official interpretation of its regulation. *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995); *see also* *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1155-56 & n.34 (9th Cir. 2010); *United States v. Able Time, Inc.*, 545 F.3d 824, 836 (9th Cir. 2008); *Alaska v. Federal Subsistence Board*, 544 F.3d 1089, 1095 (9th Cir. 2008).

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[1] *See also* *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001) (explaining when deference is owed); *Wilderness Society v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1059 (9th Cir. 2003) (en banc) (explaining *Mead* deference), *amended by* 360 F.3d 1374 (9th Cir. 2004) (en banc) (order); *Pronsolino v. Nastri*, 291 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of deference); *Webber v. Crabtree*, 158 F.3d 460, 461 (9th Cir. 1998) (per curiam) ("Although we accord a high degree of deference to an agency's interpretation of its own regulation, that interpretation cannot be upheld if it is plainly erroneous or inconsistent with the regulation.").

- Agency litigating positions are wholly unsupported by regulations, rulings, or administrative practice. *See* *Resources Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1165 (9th Cir. 1998).
- "Radically inconsistent interpretations of a statute by an agency, relied upon in good faith by the public, do not command the usual measure of deference to agency action." *Pfaff v. United States Dep't of Housing & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996).
- State agency interprets federal statute. *See* *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997); *cf.* *JG v. Douglas Country School District*, 552 F.3d 786, 798 n.8 (9th Cir. 2008) (stating that although a state agency's interpretation of a federal law is not entitled to deference, the Secretary of Education's approval of that agency's interpretation is due some deference).

3. Instances Where Less Deference May Be Warranted

- Agency interpretation conflicts with agency's earlier interpretation. *See* *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928, 933 (9th Cir. 2008); *Young v. Reno*, 114 F.3d 879, 883 (9th Cir. 1997); *cf.* *Irvine Medical Ctr. v. Thompson*, 275 F.3d 823, 831 n.6 (9th Cir. 2002) (noting agency is not required to establish rules of conduct that last forever); *Queen of Angels/Hollywood Presbyterian Med. Ctr. v. Shalala*, 65 F.3d 1472, 1481 (9th Cir. 1995) (noting an agency "is not disqualified from changing its mind").
- "[J]udicial deference is not necessarily warranted where courts have experience in the area and are fully competent to decide the issue." *Monex Int'l, Ltd. v. Commodity Futures Trading Comm'n*, 83 F.3d 1130, 1133 (9th Cir. 1996) (internal quotation marks and citation omitted).

F. Substantial Evidence

Substantial evidence means more than a mere scintilla; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See* *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Gebhart v. SEC*, 595 F.3d 1034, 1043 (9th Cir. 2010); *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1011 (9th Cir. 2003). The court of appeals must consider the record as a whole, weighing both the evidence that supports and

the evidence that detracts from the agency's decision. *See* *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001); *see also* *Int'l Union of Painter & Allied Trades v. J & R Flooring, Inc.*, 656 F.3d 860, 865 (9th Cir. 2011); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 652 (9th Cir. 2010) ("The ALJ is expected to consider the record as a whole, including all witness testimony and each medical report, before entering findings"). The court must affirm where there is such relevant evidence as reasonable minds might accept as adequate to support a conclusion, even if it is possible to draw contrary conclusions from the evidence. *See* *Howard*, 341 F.3d at 1011.[2]

1. Agency Determinations

An agency's factual findings must be upheld if supported by substantial evidence in the record. *See* *United States v. Eurodif S.A.*, 555 U.S. 305, 316 n.6 (2009); *Dickinson v. Zurko*, 527 U.S. 150, 152-61 (1999) (rejecting "clearly erroneous" standard and reaffirming substantial evidence standard of review for agency findings); *Bonnichsen v. United States*, 367 F.3d 864, 879-80 (9th Cir. 2004).[3]

Credibility determinations must be upheld unless they are "inherently or patently unreasonable," *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995) (internal quotation omitted), or not supported by specific, cogent reasons, *see* *Manimbao v. Ashcroft*, 329 F.3d 655, 658 (9th Cir. 2003); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998); *DeLeon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997). *See also* *Morgan v. Mukasey*, 529 F.3d 1202, 1210 (9th Cir. 2008).

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[2] *See also* *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366 (1998) (noting under the substantial evidence standard, the reviewing court "must decide whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion"); *Gebhart v. SEC*, 595 F.3d 1034, 1043 (9th Cir. 2010) ("If the evidence is susceptible to more than one rational interpretation, we may not substitute our judgment for that of the agency."); *Recon Refractory & Construction Inc., v, NLRB*, 424 F.3d 980, 986 (9th Cir. 2005).

[3] *See also* *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003) (noting agency's factual findings must be upheld "if supported by reasonable, substantial, and probative evidence in the record").

2. Jury Verdicts

In a civil case, the court of appeals reviews a jury verdict to determine whether it is supported by substantial evidence. *See* *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1008 (9th Cir. 2004); *see also* *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 993 (9th Cir. 2007). Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw a contrary conclusion from the evidence. *See* *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002); *see also* *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 955 (9th Cir. 2011); *Harper v. City of Los Angeles*, 533 F.3d 1010, 1021 (9th Cir. 2008). Neither the trial court nor the appellate court may weigh the evidence or assess the credibility of witnesses in determining whether substantial evidence exists. *See* *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999); *see also* *McCollough*, 637 F.3d at 957; *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) ("The credibility of witnesses is an issue for the jury and is generally not subject to appellate review.").

In criminal cases, a jury verdict also must stand if it is supported by "substantial evidence." *See*, *e.g.*, *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002). Again, substantial evidence is evidence which reasonable minds might accept as adequate to support a conclusion. *See* *United States v. Nordbrock*, 38 F.3d 440, 445 (9th Cir. 1994).

G. Reasonableness

An agency action raising predominantly legal rather than factual issues may be reviewed under a reasonableness standard. *See*, *e.g.*, *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 964 (9th Cir. 2002); *Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002).[4] The reviewing court must determine whether the agency's decision was a reasonable exercise of its discretion, based on consideration of relevant factors, and supported by the record. *See* *California v. FCC*, 75 F.3d 1350, 1358 (9th Cir. 1996).

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[4] *See also* *Price Rd. Neighborhood Ass'n v. United States Dep't of Transp.*, 113 F.3d 1505, 1508 (9th Cir. 1997); *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995).

"The scope of judicial review under this standard is narrow and an agency's interpretation of its own policies and prior orders is entitled to deference." *California v. FCC*, 4 F.3d 1505, 1511 (9th Cir. 1993). The court may, however, require the agency to provide a reasoned analysis. *See California v. FCC*, 39 F.3d 919, 925 (9th Cir. 1994). "Moreover, if the record reveals that the agency has failed to consider an important aspect of the problem or has offered an explanation for its decision that runs counter to the evidence before [it], we must find the agency in violation of the APA." *Id.* (internal quotations omitted).

The reasonableness standard has been described as more rigorous than the arbitrary and capricious standard. *See, e.g., Ka Makani*, 295 F.3d at 959 (describing reasonableness standard as "less deferential"). "'The Supreme Court has noted, however, that 'the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence.'" *California v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011 (9th Cir. 2009) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 n.23 (1989)). This court has observed that "[t]he rule of reason analysis and the review for an abuse of discretion are essentially the same." *See Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002).